

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8165

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK JAMES KONSAVICH,

Defendant - Appellant.

Appeal from the United States District Court for the Western
District of Virginia, at Harrisonburg. Glen E. Conrad, District
Judge. (5:05-cr-00019-gec-1)

Submitted: April 9, 2009

Decided: April 21, 2009

Before TRAXLER, KING, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Mark James Konsavich, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mark James Konsavich appeals the district court's order denying his Fed. R. Crim. P. 33 motion for a new trial. We have reviewed the record and find the district court did not abuse its discretion in denying the motion. United States v. Smith, 451 F.3d 209, 216 (4th Cir. 2006) (stating standard of review). In order to warrant a new trial based on newly discovered evidence, a defendant must show that: (1) the evidence is newly discovered; (2) the defendant used due diligence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence would probably result in an acquittal at a new trial. United States v. Lofton, 233 F.3d 313 (4th Cir. 2000). Unless the defendant demonstrates all five of these factors, the motion should be denied. United States v. Chavis, 880 F.2d 788, 793 (4th Cir. 1989). Konsavich failed to show the newly discovered evidence would probably result in an acquittal at a new trial.

Accordingly, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED